

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In The Matter Of )

Amendment of Section 73.606 (b) )

Table of Allotments )

Television Broadcast Stations )

(New Albany, Indiana) )

MM Docket No. \_\_\_\_\_

RM No. \_\_\_\_\_

To: Chief, Allocations Branch

**AMENDMENT TO PETITION FOR RULE MAKING**

Fant Broadcast Development, L.L.C.

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Dated: July 13, 2000

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## SUMMARY

Fant Broadcast Development, L.L.C. ("Fant") submits this amendment to its petition for rule making to allot a new NTSC television channel 39, at New Albany, Indiana instead of channel 49 as proposed in Fant's original petition for rule making. This amended proposal would enable the Commission to allot the first local television service to New Albany and to foster the creation of competitive national television networks, such as the WB Television Network, which has expressed a willingness to enter into an affiliation agreement with Fant for this channel.

This amendment is necessary because the proposal in Fant's original petition would substantially interfere with digital channel 49 at Louisville, Kentucky. The proposal in this amendment is short-spaced to three NTSC stations. However, Fant shows herein that in one instance, the short-spacing is .1 kilometer, and the resulting interference would be less than .5% and is, thus, not considered. With respect to the second short-spacing, to channel 32 at Louisville, Kentucky, the only anticipated interference would consist of oscillator interference to the New Albany station, which would be negligible. Finally, Fant's proposal is short-spaced to channel 39, Murfreesboro, Tennessee but with equivalent protection (an antenna with at least a 12dB null towards Murfreesboro and a power limit of 1,000W), there will be no excessive interference to or from the Murfreesboro station. Such equivalent protection should be a condition of the allotment.

The Commission should waive its minimum distance separations for NTSC stations and grant this proposal. It represents the best way to bring the first local television service to the residents of New Albany and to carry out the Commission's longstanding policy goal of fostering the emergence of new networks. No fully-spaced allocation for New Albany was

benefits from a grant of this proposal, with no corresponding harm to the public. With the transition to DTV, this is the last opportunity for the near term to bring a worthwhile first television service to the residents of New Albany. The Commission should grant this petition.

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Amendment of Section 73.606 (b)	)	MM Docket No. _____
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(New Albany, Indiana)	)	
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To: Chief, Allocations Branch

**AMENDMENT TO PETITION FOR RULE MAKING**

Fant Broadcast Development, L.L.C. ("Fant"), by its attorneys, hereby submits this amendment to its petition for rule making to amend the TV Table of Allotments to allot channel 39 to New Albany, Indiana, rather than channel 49 as Fant originally requested. Fant's proposal is to amend Section 73.606(b) of the Commission's rules as follows:

	<b><u>Channel No.</u></b>	
<b><u>City</u></b>	<b><u>Present</u></b>	<b><u>Proposed</u></b>
New Albany, Indiana	—	39

**I. Background**

Fant filed on July 23, 1996 a petition for rule making to amend the TV Table of Allotments to allot channel 49 to New Albany, Indiana. The Chief of the Allocations Branch issued a letter ruling dated November 1, 1996 deeming Fant's petition unacceptable for consideration because the proposal was short-spaced 24.5 kilometers to two stations, and use of the site specified by Fant as the reference point would result in short-spacing of 1.0 kilometer and

.2 kilometers to two other stations. Fant filed a petition for reconsideration of this ruling, which remains pending.<sup>1</sup>

Fant is filing this amendment to its petition for rule making pursuant to the Commission's Public Notice, 14 FCC Rcd 19559 (1999) ("Window Notice") announcing the opening of a window for the filing of, among other things, the filing of amendments to petitions for rule making seeking to add NTSC channels.

Consequently, Fant proposes that the Commission allot channel 39 to New Albany, Indiana for that community's first local television service.<sup>2</sup> As set forth in the attached Engineering Statement of Pete E. Myrl Warren, III, Fant's proposal is short-spaced by .1 kilometer to the licensed site of WKYU-TV, channel 24, Bowling Green, Kentucky; by 22.2 kilometers to the licensed site of WHTN, channel 39, Murfreesboro, Tennessee; and by 60.3 kilometers to the licensed site of WLKY-TV, channel 32, Louisville, Kentucky.<sup>3</sup> Fant is,

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<sup>1</sup> On July 23, 1996, Fant also filed an application for a construction permit for a new full-service television station at New Albany, Indiana on channel 49. That proposal was within the freeze zone established by Advanced Television Systems and Their Impact on the Existing Television Service, 52 Fed. Reg. 28346 (July 29, 1987), but Fant's requested waiver of the freeze based upon Fant's proposal to bring a first local television service to New Albany and the Commission's interest in fostering the emergence of competitive national television networks since the WB Television Network has expressed a willingness to enter into an affiliation agreement with Fant for New Albany.

<sup>2</sup> Consistent with the Window Notice, Fant will amend its application to specify channel 39 as directed in an allotment Report and order adding the channel to the TV Table of Allotments.

<sup>3</sup> These calculations are based on use of the coordinates of Fant's proposed site as the reference coordinates in New Albany. Fant has obtained a letter of reasonable assurance for use of the site, and thus the site is available within the meaning of §73.611(a)(4) of the Commission's rules. Thus, under §73.611(a)(4), Fant's proposal should be evaluated by using Fant's proposed site as the reference point.

therefore, requesting a waiver of §73.610, 73.611(a)(4), and 73.698 of the Commission's rules because the proposed allotment would further the Commission's interest in fostering the emergence of competitive national television networks and fulfill the Commission's duty under §307(b) of the Communications Act.

From a technical standpoint, as explained in the attached Engineering Statement, the short-spacing of .1 kilometer to WKYU-TV, channel 24, Bowling Green, Kentucky is within rounding error and not considered. See Establishment of a Class A Television Service, FCC 00-115, 2000 FCC Lexis 1746, \*93 (March 28, 2000). As for the short-spacing to WLKY-TV, channel 32, Louisville, Kentucky, Fant would not cause any interference to WLKY-TV, and the only interference to be received by the New Albany station would be minimal oscillator interference (oscillator interference does not occur on 7 channels below another television station). In the past, the Video Services Division has granted a waiver of Section §73.610 to permit a short-spacing of 10.4 Km of the -7 taboo based on a showing that the only possible interference would consist of local oscillator interference to the higher channel, which would be negligible. See Montgomery County Media Network, Inc., 1800E-1DOB, dated May 31, 1996 (Vid. Svcs. Div.). This ruling, while at the application stage not the allotment stage, supports a grant of Fant's proposal.

With regard to WHTN, channel 39, Murfreesboro, Tennessee, Fant proposes that a Report and Order adopting this proposal require equivalent protection to WHTN. That equivalent protection should require an antenna 12dB null toward Murfreesboro, Tennessee and power of no more than 1,000 KW. With that protection, there will be no interference to or from

channel 39, Murfreesboro, Tennessee.<sup>4</sup> See Engineering Statement. In adopting this proposal, the Commission should include a condition that such equivalent protection be given to WHTN, Murfreesboro, Tennessee.

## **II. The Public Interest Compels Grant of This Amendment**

Fant makes its proposal for an allotment to New Albany, Indiana in accordance with the Window Notice so that a first local television service can be brought there. Fant filed its application almost four years ago, but no action could be taken because of the freeze. Now, in light of the Window Notice, this amended petition represents the last opportunity for the allotment of a first local commercial NTSC television service to New Albany. There is no DTV allotment for New Albany. The city of New Albany, Indiana is an incorporated community with a 1990 U.S. Census population of 36,322 people. It is the county seat of Floyd County and a principal business center. The residents of New Albany need a NTSC allotment if they are to receive a first local commercial television service. The public interest compels a grant of this amended petition under these circumstances to fulfill the Commission's duty under section 307(b) of the Communications Act. See National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943); FCC v. Allentown Broadcasting Co., 349 U.S. 358, 359-62 (1955).

As set forth in the accompanying waiver request, a grant of this petition will also serve the public interest because it will foster the development of a competitive national television

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<sup>4</sup>The proposal is short-spaced to five digital television allotments, but under the Window Notice, the proposal in a petition to add a NTSC channel, such as this one, need not comply with the DTV minimum separations, and in any event the interference to such allotments is all less than .5% and is not considered. See Establishment of a Class A Service, 2000 FCC Lexis 1746, \*93 (March 28, 2000).



network in the top 100 markets. For all of these reasons, more fully set forth below, the Commission should grant this amended petition.

### **III. Request for Waiver**

#### **A. Introduction**

Fant hereby requests a waiver of §73.610, 73.611 (a)(4), and 73.698 of the Commission's rules because the proposed allotment is short-spaced to NTSC allotments as already indicated: .1 kilometer to WKYU-TV, channel 24, Bowling Green, Kentucky; 22.2 kilometers to WHTN, channel 39, Murfreesboro, Tennessee; and, 60.3 kilometers to WLKY-TV, channel 32, Louisville, Kentucky.

The public interest compels grant of a waiver here. Grant of Fant's amended petition will foster the emergence of a new national television network by establishing an outlet in a top 100 television market within which a new network, the WB Television Network ("WB"), has indicated a willingness to enter into an affiliation agreement with Fant for the station if this amended petition is granted and Fant's application is granted. The WB needs new allotments, such as the one proposed here by Fant, if the WB is to become a strong competitive alternative to the four major television networks in all of the top 100 markets. This matter has been before the Commission since 1996; the residents of New Albany should not have to wait any longer for the new competitive service that Fant could provide.

Indeed, this amended petition is the last opportunity to provide this competitive alternative via NTSC service. Thus, a grant of this amended petition will not create any troublesome precedent. Rather, the amended petition should be granted because the citizens of New Albany should not have to wait indefinitely before getting their first local television service.

As soon as the transition to DTV is completed and Fant can move to a fully-spaced DTV channel, it will do so.

### **B. Legal Standards**

The Commission has long held that it will waive the NTSC minimum distance separations when the public interest will be better served by a waiver instead of insisting on strict compliance with the rules, E.g., K-W TV, Inc., 7 FCC Rcd 3617, 3618 (1992). While the Commission has in the past applied a stricter standard for a waiver at the allotment stage (a waiver of §73.610) than in an application, there is no precedent for the standard the Commission should use in weighing a waiver request, such as Fant's, which comes at the last opportunity to add NTSC allotments. Moreover, Fant is filing this amendment as the Commission has ordered the reallocation of channels 60-69 to public safety services, thereby limiting Fant's options in identifying a suitable NTSC channel. Under all of these circumstances, Fant submits that in weighing this waiver request, the Commission should apply a much more lenient standard than it would if this were just a run-of-the-mill short-spaced allocation proposal.

Under §73.610, the Commission grants a waiver if the applicant showed that the public interest would be better served by grant of a waiver, but the Commission would only grant a waiver at the allotment stage based upon an extraordinary situation, special justification, or compelling need, E.g., K-W TV, Inc., 7 FCC Rcd at 3618; Portland, Tennessee, 35 FCC 2d 601, 602 (1972); Toms River, New Jersey, 43 FCC 2d 414, 417-418 (1973). The Commission did grant such waivers in the VHF Drop-In Proceeding, 81 FCC 2d 233 (1980), in which the Commission stated that the basic issue was whether the benefits of added competition, diversity, and service outweigh claims of potential harm.

Here, the benefits of added competition, diversity and service from a grant of this amended petition far outweigh any claim of potential harm. This is especially true because Fant's amended petition is fully in keeping with well-established Commission policy to foster the emergence of new national television networks, such as the network that has expressed a willingness to sign an affiliation agreement with Fant, the WB. See, e.g., VHF-Drop-In Proceeding, 81 FCC 2d at 253. The attached Engineering Statement shows that Fant's proposal will not cause or receive any harmful interference to any harmful interference to any other NTSC or DTV station or allotments exceeding the Commission's guidelines. Accordingly, the circumstances surrounding this amended petition do represent an extraordinary situation and evidence a compelling need. As already shown, the potential interference that will result is minor, and providing the citizens of New Albany with the potential for enjoying a competitive alternative to the big four television networks (and the town's first local television service) are substantial public benefits.

### **C. The Public Interest Compels Grant of This Request**

The Commission previously has waived the distance separation requirements to permit the allotment of new television stations in an effort to foster the development of new networks in Docket No. 13340, Interim Policy on VHF Television Channel Assignments, 21 RR 1695 (1961), recon. denied, 21 RR 1710a (1961) ("Interim Policy"). The Commission instituted a rulemaking proceeding in an effort to find a means of alleviating the need for additional channel assignments in the larger television markets in order to foster the development of a nationwide competitive television system. The Commission concluded that the most efficient means of accomplishing its

objective would be to permit, under limited circumstances, channel assignments at substandard spacings.

The short-spaced allotments were authorized subject to the requirement that the new stations provide protection to the existing short-spaced stations to assure that they would not receive interference in excess of the amount they otherwise would receive from a co-channel station operating with maximum facilities at full distance separation. The Commission designated ten markets in which such a "squeeze in" procedure would be considered. Many of these proposals, as well as those which arose out of the Commission's Interim Policy, involved a third commercial VHF allotment in a market that was designed to provide an additional broadcast outlet which was critical to the establishment of a third competitive network. See, e.g., Grand Rapids, Michigan, 21 RR 1737 (1961) (Commission assigned a second VHF channel to Grand Rapids and a third to the Grand Rapids-Kalamazoo market),<sup>5</sup> Rochester, New York, 21 RR 1748a (1961)(same).

The same considerations warrant grant of a waiver here for Fant. There is no outlet now for an affiliate of a fourth network in the area surrounding New Albany (including Louisville, Kentucky). The attached Engineering Statement demonstrates that Fant's proposed allotment will not receive excessive interference.

After issuing the Interim Policy, the Commission later extended its policy of waiving its spacing provisions in appropriate circumstances to permit "move-in" applications. In New

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<sup>5</sup> In Grand Rapids, the Commission allotted Channel 13 to Grand Rapids, which required the substitution of Channel 9 for Channel 13 at Cadillac, Michigan, and the substitution of channel 7 for a Channel 9 allotment at Alpena, Michigan. Id. at 1745. The Commission's action was designed to alleviate the "critical shortage of competitively comparable facilities in major markets. . . ." 21 RR at 1745.

Orleans Television Corp., 23 RR 1113, 1115 (1962), a New Orleans station filed an application to move closer to its community of license to a site 30 miles short-spaced to a co-channel station in Jackson, Mississippi. The applicant requested a waiver of the mileage separation requirements and proposed to provide equivalent protection to the co-channel station. In reviewing the application, the Commission noted that its long-standing policy of fostering the development of “at least three” competitive television networks had often been frustrated by its inability to assign a third competitive commercial VHF channel. Id. at 1115. The Commission also expressly stated the rationale which it used to adopt the Interim Policy:

The problem with which the Commission grappled in Docket No. 11340 was the fostering of a nationwide competition network situation. To accomplish this purpose it is necessary to assure the availability of competitive facilities to the networks within the major markets, for the economic ability of a network to survive and furnish the public with the benefits of its operation hinges ultimately on its access to competitive facilities within the major markets. By assuring the existence of a third competitive station in New Orleans, the Commission benefits not only the viewing public of that city but, ultimately, the public of the entire nation. We believe that the benefits to be derived from furtherance of this policy justify the use of Channel 12 in New Orleans at substandard spacings.

Id. at 1117 (initial emphasis added), citing Interim Policy 21 RR at 1710. Thus, in granting the short-spaced application, the Commission not only provided a third competitive station in New Orleans, but the public interest benefits resulting from the grant of the short-spaced application extended to the entire country due to the Commission’s effort to foster the emergence of a third national network. Id. at 1117. This same rationale supports grant of a waiver to Fant here, based upon the public interest benefits that will accrue from fostering an additional national television network.

Similarly, in Television Broadcasters, Inc., 4 RR 2d 119 (1965), an ABC affiliate sought to move its transmitter to a location which was 18.8 miles short-spaced to a co-channel station.

The applicant proposed to provide equivalent protection to KSIA-TV by directionalizing its signal away from the short-spaced station, and requested a waiver of Section §73.610 of the rules. Id. at 121. In support of its waiver request, the applicant claimed that, from its existing transmitter site, it could not effectively compete with the local CBS and NBC affiliates which served essentially the same area, and was operating at a substantial loss.<sup>6</sup>

Id. at 121. The applicant contended that a grant of its application would enhance its competitive position as well as that of ABC vis-a-vis the other stations and networks in the market, and would provide its coverage area with a third competitive network television service. Id. at 123.

In granting the application and accompanying request for waiver of Section §73.610 of the rules, the Commission stated:

While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets.

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<sup>6</sup> The Commission found that there was a substantial disparity between the advertising rates of KBMT and the other network affiliates in the market. Id. at 123.

Id. at 123, citing Peninsula Broadcasting Corporation, 3 RR 2d 243 (1964).<sup>7</sup> Fant asks the Commission to follow this same duty here and provide for “more effective competition among the networks” in the New Albany, Indiana area.

Furthermore, in the VHF Drop-Ins Proceeding, the Commission granted requests for waiver of Section §73.610 to permit the allotment of new short-spaced VHF assignments to Charleston, West Virginia; Johnstown, Pennsylvania; Salt Lake City, Utah; and Knoxville, Tennessee. Each short-spaced allotment was subject to the condition that the new station provide equivalent protection to the existing station to which it was short-spaced. Id. at 234.

In granting the waiver requests, the Commission recognized that the four VHF drop-ins represented a significant departure from Commission precedent.<sup>8</sup> Nevertheless, the Commission concluded that the new VHF allotments would serve important public interest objectives such as providing new local service, the promotion of additional networks, and increased competition in advertising markets. The Commission found these to be substantial contributions to the public interest. Id. at 253. Moreover, on reconsideration, the Commission observed that application of

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<sup>7</sup> In Peninsula Broadcasting, the applicant alleged that a grant of its application was warranted in order to provide three competitive network services in the Norfolk, Virginia, television market. In granting the application and the accompanying short-spacing waiver request, the Commission stated:

{We have} long been concerned with the problem of making three truly competitive network services available to the public in major markets and where the opportunity is presented to achieve this objective without detriment to anyone and with benefit to many, we think . . . it is clear that a grant of the application would be warranted.

<sup>8</sup> Despite the Commission’s Interim Policy, there had been no short-spaced VHF allotments in the continental United States prior to its decision in VHF Top 100 Markets. 81 FCC 2d at 239.

the distance separation rules would achieve a result contrary to the public interest by preventing new and needed television services, and that a waiver of the rules would not undermine the policy behind them as set forth in the Sixth Report and Order in Docket Nos. 8736 et. al., Amendment of Section 3.606 of the Commission's Rules and Regulations, 41 FCC 148 (1952) ("Sixth Report and Order").

The public interest benefits that would result from a grant of Fant's amended petition are the same public interest objectives which the Commission sought to achieve in the Interim Policy and the VHF Drop-In Proceedings. Indeed, this rule making amended petition and accompanying request for waiver of the Commission's distance separation requirements would provide the same, if not greater, public interest benefits that the Commission previously found sufficient to justify a waiving of its distance separation requirements. As stated above, the allotment of Channel 39 provides New Albany, Indiana with its first local television service, which will promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities. 47 U.S.C. §307(b). See National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States")' FCC v. Allentown Broadcasting Co., 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression"). In addition, the proposed allotment will promote the second television allotment priority established in the Sixth Report and Order of providing each community with at least one television broadcast station. 41 FCC at 167.



As the Commission is well aware, almost two-thirds of all television markets have only four commercial stations. As a result, it is extremely difficult for any new network, including The WB, the United Paramount Network ("UPN), or Paxson Network ("Paxnet") to find affiliates in the major markets. The WB generally has been the fifth, and often the sixth, network to enter those top 100 markets in which it has an affiliate. Indeed, the WB has explained to the Commission in a variety of proceedings that its primary challenge in establishing itself as a nationwide network has been finding a sufficient number of stations with which to affiliate.<sup>9</sup>

Thus, a grant of this waiver request and the allotment of Channel 39 to New Albany would provide critical assistance in fostering the development of new national networks by helping to alleviate the need for additional broadcast outlets. Specifically, a grant of this waiver request would permit the allotment of new television station in a top 100 market with which the WB (or another emerging network) could affiliate, and thereby make progress towards achieving national penetration and a competitive stronghold with the established for networks. Although there is no guarantee that Fant will obtain the construction permit for the proposed new television station at New Albany, or that the station will affiliate with the WB, the allotment of Channel 39 to New Albany would provide an additional broadcast outlet for all of the new networks to have

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<sup>9</sup> See, e.g., Comments of The WB Television Network, Establishment of a Class A Television Service, MM Docket No. 00-10 (filed Feb. 10, 2000); Comments and Reply Comments of The Warner Bros. Television Network, Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates, MM Docket No. 95-92 (filed Oct. 30, 1995, Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, Reexamination of The Policy Statement in Comparative Broadcast Hearings, GC Docket No. 92-52 (filed Aug. 22, 1994). UPN has expressed similar difficulties in attempting to establish a nationwide presence. See Comments of the UPN, Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates, MM Docket No. 95-92 at 21-22 (filed Oct. 30, 1995).

the opportunity to gain an affiliation and thereby strengthen their effort to obtain a nationwide audience.

By waiving the minimum distance separation requirements and allotting Channel 39 to New Albany, the Commission can provide an additional broadcast outlet in a major market and thereby foster the development of a new national network.

**D. A Grant of the Requested Waiver Would Not Undermine the Commission's General Policy Regarding Short-Spaced Allotment**

The full Commission recently stated its policy regarding short-spaced allotments in Pueblo, Colorado 16 Comm. Reg. (P&F) 610 (1999) (Memorandum Opinion and Order on Remand):

{B}y maintaining strict adherence to a fully-spaced allotment scheme, we preserve the capacity to permit necessary adjustments to spacing where the construction of actual facilities so requires, while minimizing potential adverse interference effects from such adjustments. This is because, when a party files a petition for rulemaking to amend the Table of Allotments, a hypothetical set of reference coordinates are used for purposes of making the allotment. The petitioner is not required to specify an actual transmitter site where the station will be operated, only a theoretical fully-spaced transmitter site location. At this point, the Commission disfavors making a short-spaced allotment because it does not want to begin the process with a substandard allotment. In order to protect the integrity of the Table, the Commission demands that the process of creating a new station begin with an allotment that is not already short-spaced. However, later, when a party files an application to construct its actual transmitter site, and the Commission examines the actual facilities that will be constructed to operate the station, it may be determined that no fully-spaced transmitter sites are available. At that later point in the process, the Commission may allow a deviation of its spacing rules when it is demonstrated that the public interest benefits are great enough to support a waiver.

Id. at 616, ¶23. The full Commission has also stated that “{s}trict adherence to the spacing requirements set forth in the Table of Allotments is necessary . . . in order to provide a consistent,

reliable and efficient scheme of (allotments).” Chester and Wedgefield, South Carolina, 5 FCC Rcd 5572 (1990).

By requiring that a proposed allotment be fully-spaced at the outset, the Commission’s policy is designed to “minimiz{e} potential adverse interference effects” that may result from “necessary adjustments” in the event no full-spaced transmitter sites are available at the application stage. This general allotment policy should not be applied here. The substantial public interest benefits that would result from the proposed allotment substantially outweighs the commission’s general regulatory interest in protecting the “integrity of the Table of Allotments,” especially when the proposed allotment would subject the short-spaced station to no greater interference than any fully-spaced allotment.

Moreover, as noted supra, the Commission’s interest in maintaining the “integrity of the Table of Allotments” and providing “a consistent, reliable and efficient” allotment scheme should be given diminished consideration with respect to the rule making petitions and amended petitions filed in response to the Window Notice because this is the last opportunity to amend the NTSC Table of Allotments. The deadline for filing allotment rulemaking petitions for new NTSC stations expired on July 25, 1996.<sup>10</sup> Upon the close of this window filing period on July 17, 2000, there will be no further opportunity amend the NTSC Table of Allotments. Therefore, because the allotment proposals filed during this window represent the last NTSC rulemaking petitions that will ever be filed with the Commission, a waiver of the Commission’s distance separation requirements pursuant to the policy objectives set forth in the Interim Policy and VHF

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<sup>10</sup> See Sixth Report and Order in MM Docket No. 87-268, Advanced Television Systems and Their Impact Upon the Existing Broadcast Service, 12 FCC Rcd 14588, 14635-36 (1997) (“DTV Proceeding”).

Drop-Ins would not open the floodgates to similar waiver requests in the future. As in VHF Drop-Ins, the Window Notice provides a limited filing opportunity during which there can be only a small, finite number of short-spaced allotment proposals that would provide sufficient public interest benefits to warrant a waiver of the spacing rules.

**E. The FCC Must Give This Waiver Request the Requisite “Hard Look”**

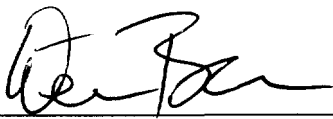
It is well established that the Commission is “required to give waiver requests a ‘hard look’ and may not treat well-pleaded waiver requests in a perfunctory manner.” VHF Top 100 Markets, 90 FCC 2d 160, 166 (1982) (reconsideration order), citing WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Indeed, as the D.C. Circuit has made clear in WAIT Radio:

. . . {A} general rule, deemed valid because its overall objectives are in the public interest, may not be in the “public interest” if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

**IV. Conclusion**

For all of the reasons set forth herein, the Commission should grant Fant a waiver and adopt the amended proposal set forth herein.

Respectfully submitted,

By: \_\_\_\_\_

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**ENGINEERING EXHIBIT  
PETITION TO MODIFY THE TABLE OF  
ALLOTMENTS TO SPECIFY A  
DISPLACEMENT CHANNEL TO  
SUBSTITUTE FOR NEW ALBANY, IN  
(Channel 39)**

June 23, 2000

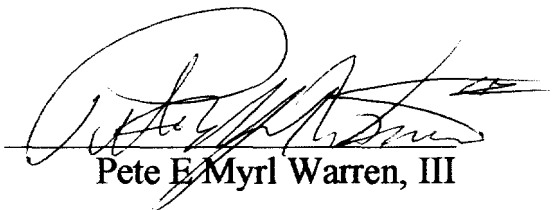
**ENGINEERING STATEMENT**

**Wes, Inc.**

## **DECLARATION**

I, Pete E Myrl Warren, III, declare and state that I am a Certified Broadcast Engineer, by the National Association of Radio and Television Engineers, and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of Wes, Inc., and that the firm has been retained to prepare an engineering statement on behalf of Fant Broadcasting Development, L.L.C.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.



Pete E Myrl Warren, III

Executed on the 23rd day of June, 2000

**Narrative Statement**

**I. GENERAL**

This engineering report has been prepared on behalf Fant Broadcasting Development, L.L.C. in support of its request for a displacement channel (Channel 39) for its pending application for Channel 49 in New Albany, Indiana, Channel 49.

**II. ENGINEERING DISCUSSION**

The applicant originally applied for a construction permit for channel 49 in New Albany, IN. The applicant is precluded from going on channel 49 due to interference to Louisville, Kentucky, digital channel 49 as outlined in Exhibit RM-1

The applicant proposes the following site:

North Latitude: 38° 05' 55"

West Longitude: 86° 02' 52"

It is proposed to amend Section 73.606(b) of the Commission's rules, NTSC Table of Allotments, to allot Channel 39 (620-626 MHz) for the NTSC television operation of Fant Broadcasting, L.L.C. As demonstrated below, the proposed Channel 39 NTSC operation at New Albany, Indiana, will not cause any harmful interference to any other analog NTSC or DTV station or allotments exceeding the Commission's guidelines. New Albany, IN Channel 39 would provide additional service to a population of 1,234,617 people.

The proposed NTSC Channel 39 can operate from the proposed antenna site with an Antenna Concepts ACB-32-D at one megawatt oriented at 60 degrees at a height of 564 meters AMSL, 365 meters HAAT without adversely impacting any other TV operations. An attached antenna pattern is included in Exhibit ANT-1. The proposed Channel 39 would serve all of New Albany, Indiana within its 80 dBu contour. This site is available to the applicant.



### Analog NTSC TV Allocation Situation

The attached Exhibit RM-2 demonstrates that Channel 39, New Albany, Indiana, is free of all short-spacings to other NTSC stations with the exception of Louisville, KY Channel 32, Murfreesboro, TN Channel 39, and Bowling Green, KY Channel 24. The applicant will not cause any interference to Louisville, KY Channel 32. The only anticipated interference is minimal and would be from the +7 oscillator interference to the channel 39, which we expect to be negligible. Oscillator interference does not occur on channels that are 7 channels below that of another television station. In regards to Murfreesboro, TN Channel 39, the applicant proposes equivalent protection to protect Murfreesboro, TN. The applicant proposes an antenna with at least a 12dB null towards Murfreesboro, TN and will decrease its power to 1,000 kW. In regards to Bowling Green, KY Channel 24, the applicant is 0.1 kilometers short-spaced to Bowling Green. Any short-spacing of less than half a kilometer is considered de minimus and can be ignored.

### DTV Allocation Situation

The applicant is short-spaced to five digital allotments, as outlined in Exhibit RM-3. The interference accepted by each of these stations is less than 0.5% and is therefore considered negligible and acceptable. The attached exhibits FLR-1 through FLR-5 demonstrate what interference Richmond, IN channel 39, Terre Haute, IN Channel 39, Elizabethton, KY Channel 43, Louisville, KY 38, and Louisville, KY Channel 47 will receive with New Albany included and without New Albany included.

### **III. Class A**

**The applicant does not cause interference to any Class A LPTV stations as is demonstrated in Exh. CLA.**

### **IV. Summary**

The applicant must change channel from Channel 49 in New Albany, Indiana, to Channel 39 in order to avoid interference to digital

television. On channel 39, New Albany will not cause any interference to any digital or NTSC station.

**Exhibit FLR-1**  
**New Albany, IN Channel 39**  
**June 23, 2000**

**Fortran Longley-Rice Interference Study**  
**by WES, Inc. Broadcast Consultants**

Study run without New Albany, IN Channel 39 included:

Run begins Fri Jun 23 16:33:34 1998, host providence

Analysis of: 39A IN RICHMOND

HAAT 286.0 m, ATV ERP 500.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2973921	21857.0
not affected by terrain losses	2971859	21724.4
lost to NTSC IX	15201	337.4
lost to additional IX by ATV	889	88.4
lost to ATV IX only	996	96.4
lost to all IX	16090	425.8

Finished Fri Jun 23 16:41:34; run time 0:07:35

22048 calls to Longley-Rice; path distance increment 1.00 km

Study run with New Albany, In Channel 39 included at 1,000 kW:

Run begins Fri Jun 23 14:32:26 2000, host providence

Analysis of: 39A IN RICHMOND

HAAT 286.0 m, ATV ERP 500.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2973921	21857.0
not affected by terrain losses	2971859	21724.4
lost to NTSC IX	15898	397.7
lost to additional IX by ATV	677	68.3
lost to ATV IX only	996	96.4
lost to all IX	16575	466.0

Finished Fri Jun 23 14:44:14; run time 0:09:10

27080 calls to Longley-Rice; path distance increment 1.00 km

**Exhibit FLR-2**  
**New Albany, IN Channel 39**  
**June 23, 2000**

**Fortran Longley-Rice Interference Study**  
**by WES, Inc. Broadcast Consultants**

Study run without New Albany, IN Channel 39 included:

Run begins Fri Jun 23 15:32:41 2000, host providence

Analysis of: 39A IN TERRE HAUTE

HAAT 282.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	725339	27628.0
not affected by terrain losses	722051	27426.4
lost to NTSC IX	2437	88.7
lost to additional IX by ATV	1518	60.5
lost to ATV IX only	2000	80.6
lost to all IX	3955	149.2

Finished Fri Jun 23 15:45:31; run time 0:10:15

28791 calls to Longley-Rice; path distance increment 1.00 km

Study run with New Albany, In Channel 39 included at 1,000 kW:

Run begins Fri Jun 23 13:46:22 2000, host providence

Analysis of: 39A IN TERRE HAUTE

HAAT 282.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	725339	27628.0
not affected by terrain losses	722051	27426.4
lost to NTSC IX	5428	221.8
lost to additional IX by ATV	709	48.4
lost to ATV IX only	2000	80.6
lost to all IX	6137	270.2

Finished Fri Jun 23 14:01:33; run time 0:11:39

35179 calls to Longley-Rice; path distance increment 1.00 km

**Exhibit FLR-3**  
**New Albany, IN Channel 39**  
**June 23, 2000**

**Fortran Longley-Rice Interference Study**  
**by WES, Inc. Broadcast Consultants**

Study run without New Albany, IN Channel 39 included:

Run begins Fri Jun 23 17:54:20 2000, host providence

Analysis of: 43A KY ELIZABETHTOWN

HAAT 198.0 m, ATV ERP 50.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	930386	14199.7
not affected by terrain losses	913355	13922.2
lost to NTSC IX	12883	80.4
lost to additional IX by ATV	279	12.1
lost to ATV IX only	298	20.1
lost to all IX	13162	92.5

Finished Fri Jun 23 18:00:08; run time 0:04:24

12760 calls to Longley-Rice; path distance increment 1.00 km

Study run with New Albany, In Channel 39 included at 1,000 kW:

Run begins Fri Jun 23 16:43:55 2000, host providence

Analysis of: 43A KY ELIZABETHTOWN

HAAT 198.0 m, ATV ERP 50.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	930386	14199.7
not affected by terrain losses	913355	13922.2
lost to NTSC IX	12883	80.4
lost to additional IX by ATV	279	12.1
lost to ATV IX only	298	20.1
lost to all IX	13162	92.5

Finished Fri Jun 23 16:49:45; run time 0:04:28

12760 calls to Longley-Rice; path distance increment 1.00 km

**Exhibit FLR-4**  
**New Albany, IN Channel 39**  
**June 23, 2000**

**Fortran Longley-Rice Interference Study**  
**by WES, Inc. Broadcast Consultants**

Study run without New Albany, IN Channel 39 included:

Run begins Fri Jun 23 16:44:24 2000, host providence

Analysis of: 38A KY LOUISVILLE

HAAT 251.0 m, ATV ERP 50.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	1236602	15675.3
not affected by terrain losses	1231801	15328.4
lost to NTSC IX	8183	367.1
lost to additional IX by ATV	0	0.0
lost to ATV IX only	12	4.0
lost to all IX	8183	367.1

Finished Fri Jun 23 16:49:18; run time 0:04:37

14121 calls to Longley-Rice; path distance increment 1.00 km

Study run with New Albany, In Channel 39 included at 1,000 kW:

Run begins Fri Jun 23 17:31:53 2000, host providence

Analysis of: 38A KY LOUISVILLE

HAAT 251.0 m, ATV ERP 50.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	1236602	15675.3
not affected by terrain losses	1231801	15328.4
lost to NTSC IX	8212	371.1
lost to additional IX by ATV	0	0.0
lost to ATV IX only	12	4.0
lost to all IX	8212	371.1

Finished Fri Jun 23 17:38:10; run time 0:04:52

17250 calls to Longley-Rice; path distance increment 1.00 km

**Exhibit FLR-5**  
**New Albany, IN Channel 39**  
**June 23, 2000**

**Fortran Longley-Rice Interference Study**  
**by WES, Inc. Broadcast Consultants**

Study run without New Albany, IN Channel 39 included:

Run begins Fri Jun 23 18:02:09 2000, host providence

Analysis of: 47A KY LOUISVILLE

HAAT 527.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2736651	40847.4
not affected by terrain losses	2632242	39659.6
lost to NTSC IX	118898	350.3
lost to additional IX by ATV	315	20.1
lost to ATV IX only	1764	28.2
lost to all IX	119213	370.4

Finished Fri Jun 23 18:11:43; run time 0:07:25

26526 calls to Longley-Rice; path distance increment 1.00 km

Study run with New Albany, In Channel 39 included at 1,000 kW.

Run begins Fri Jun 23 17:41:14 2000, host providence

Analysis of: 47A KY LOUISVILLE

HAAT 527.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	2736651	40847.4
not affected by terrain losses	2632242	39659.6
lost to NTSC IX	118898	350.3
lost to additional IX by ATV	315	20.1
lost to ATV IX only	1764	28.2
lost to all IX	119213	370.4

Finished Fri Jun 23 17:50:48; run time 0:07:25

26526 calls to Longley-Rice; path distance increment 1.00 km

**Exhibit RM-1**  
**New Albany, IN Channel 49**

**June 23, 2000**

**by WES, Inc. Broadcast Consultants**

Spacing study to DTV on previously proposed channel 49

Study Location:  
New Albany, IN Channel 49

NTSC Study Station, Transmitter Coordinates: 38-5-55 N 86-2-52 W

Study distance: 429 km

\*\*\*NTSC TO DTV STUDY RESULTS\*\*\*

City of License	ST	Chan	Bearing	Distance	Req. Dist	Diff.
Huntsville	AL	49	186.64	378.46	217.30	161.16
Evansville	IN	45	259.91	133.46	80.50	52.96
Salem	IN	51	31.93	32.88	80.50	-47.62
Vincennes	IN	52	296.18	139.16	80.50	58.66
Bowling Green	KY	48	204.84	123.42	88.50	34.92
Louisville	KY	47	53.94	67.47	80.50	-13.03
Louisville	KY	49	31.93	32.88	217.30	-184.42
Grundy	VA	49	111.86	378.29	217.30	160.99
Parkersburg	WV	49	70.39	413.79	217.30	196.49

Station is short-spaced to 3 stations.



**Exhibit RM-2**  
**New Albany, IN Channel 39**

**June 23, 2000**

**by WES, Inc. Broadcast Consultants**

Spacing study to NTSC TV on newly proposed channel 39

\*\*\*\*\* TV CHANNEL SPACING STUDY \*\*\*\*\*

Job title: New Albany

Latitude: 38 5 55

Channel: 39

Longitude: 86 2 52

Database file name: tv000117.edx

CH	Call	Record No.	City	ST	Z	STS	Bear.	Dist.	Reqd. Dist.	Result
--	-----	-----	-----	--	-	---	-----	-----	-----	-----
54+	WCVNTV	3823	COVINGTON	KY	2	L	51.8	169.6	119.9	
32-	WLKYTV	4145	LOUISVILLE	KY	2	L	31.7	35.4	95.7	-60.3
41+	WDRB	4146	LOUISVILLE	KY	2	L	31.8	32.9	31.4	1.5
39+	WHTN	4414	MURFREESBORO	TN	2	L	188.8	226.4	248.6	-22.2
24-	WKYUTV	4431	BOWLING GREEN	KY	2	L	196.7	119.8	119.9	-.1
40+	WKNT	4433	BOWLING GREEN	KY	2	L	185.3	118.4	87.7	30.7
53-	WKGBTV	4434	BOWLING GREEN	KY	2	L	204.9	123.4	95.7	27.7
25-	WEHT	4618	EVANSVILLE	IN	1	L	259.5	136.0	95.7	40.3
46	WFIE-D	4624	EVANSVILLE	IN	1	A	260.1	131.3	95.7	35.6

\*\*\*\*\* End of channel 39 study \*\*\*\*\*

**Exhibit RM-3**  
**New Albany, IN Channel 39**

June 23, 2000  
by WES, Inc. Broadcast Consultants

Spacing study to Digital TV on newly proposed channel 39

Study Location:  
New Albany, IN Channel 39

NTSC Study Station, Transmitter Coordinates: 38-5-55 N 86-2-52 W

Study distance: 429 km

\*\*\*NTSC TO DTV STUDY RESULTS\*\*\*

City of License	ST	Chan	Bearing	Distance	Req. Dist	Diff.
Peoria	IL	39	314.56	415.40	217.30	198.10
Evansville	IN	54	265.90	115.63	80.50	35.13
Richmond	IN	39	38.01	199.17	217.30	-18.13
Terre Haute	IN	39	317.00	172.16	217.30	-45.14
Elizabethtown	KY	43	158.65	49.66	80.50	-30.84
Lexington	KY	40	92.82	145.29	88.50	56.79
Louisville	KY	38	32.43	35.33	88.50	-53.17
Louisville	KY	47	53.94	67.47	80.50	-13.03
St. Louis	MO	39	276.38	382.97	217.30	165.67
Jackson	TN	39	226.73	373.87	217.30	156.57
Murfreesboro	TN	38	188.69	226.43	88.50	137.93
Charleston	WV	39	83.71	375.99	217.30	158.69

Station is short-spaced to 5 stations.

**CERTIFICATE OF SERVICE**

I, Dean R. Brenner, do hereby certify that a true and correct copy of the foregoing "AMENDED PETITION FOR RULE MAKING" was served by mail this 13<sup>th</sup> day of July 2000, to:

John Karousos  
Federal Communications Commission  
Room 2-C207  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Roy Stewart  
Federal Communications Commission  
Room 2-C347  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Barbara Kriesman  
Federal Communications Commission  
Room 2-A665  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Keith Larson  
Federal Communications Commission  
Room 2-C420  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554



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Dean R. Brenner

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